In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 656

FREDERICK E. ANDERSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 8-15) is unreported. The *per curiam* opinion of the Court of Appeals (R. 335) is reported at 185 F. 2d 1021.

JURISDICTION

The judgments of the Court of Appeals were entered January 24, 1951. (R. 336-337.) The petition for a writ of certiorari was filed April 4, 1951. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the Tax Court's determination that the taxpayer's wife was not a bona fide partner in the F. E. Anderson Oil Company and that the entire income of such company was includible under Section 22 of the Internal Revenue Code in taxpayer's gross income for the taxable years.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.
>
> * * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

STATEMENT

The facts as found by the Tax Court (R. 9-12) may be summarized as follows:

In March, 1935, the taxpayer resigned his position as an employee of a nationally known oil com-

pany to engage in the manufacture and sale of lubricating oils and allied products under the name of F. E. Anderson Oil Company. Prior to April 17, 1935, the only bank account maintained by him and his wife was a joint account at the Capital National Bank & Trust Company of Hartford. On April 17, 1935, a new bank account was opened in the name of F. E. Anderson Oil Company by transferring $100 from their joint account and also by depositing at the same time $56.63 received from customers of the new venture. On that date, all of the money in the joint account in the Hartford bank had originated with the taxpayer except $3.28 as to which there is no explanation. (R. 9.)

A residence in Windsor, Connecticut, which cost $7,000 in 1925 and another in Higganum, Connecticut, which cost $9,000 in 1940 were recorded in the name of Mrs. Anderson and both pieces of property were heavily mortgaged. (R. 9.)

The F. E. Anderson Oil Company was originally financed on a factoring basis by one of taxpayer's former schoolmates in New York City, one Theurkauf, who was associated with Marsily & Company. Under that arrangement taxpayer was able to purchase oils at cost to Marsily & Company by paying them a factoring commission and interest on the total indebtedness outstanding. (R. 9-10.)

From 1935 to September 14, 1940, F. E. Anderson Oil Company borrowed at least $6,700 on the

signature of the taxpayer, and at least $1,900 on the signature of taxpayer and his wife. During the same period at least $8,651.23 was borrowed by the taxpayer and his wife on their own signatures. Also, during the same period taxpayer borrowed at least $7,700 on his own signature. (R. 10.)

On September 14, 1940, taxpayer executed an instrument entitled "Deed of Gift" in which he purported to convey to his wife a net undivided one-half interest in his oil business. Gift tax returns were filed by taxpayer and his wife on March 15, 1941, showing the value of the "gift" as $5,912.66. (R. 10.)

Also, on September 14, 1940, the taxpayer and his wife signed an instrument purporting to create a partnership in which each was to contribute an undivided one-half interest in the business of F. E. Anderson Oil Company to the "partnership" and share all profits and losses equally. Taxpayer was to manage the business and as compensation therefor was to receive $5,200 per annum. (R. 10.)

A certificate of registration of the trade name was filed with the Town Clerk of Portland, Connecticut, in which it was represented that taxpayer and his wife were the owners of the business known as F. E. Anderson Oil Company. (R. 10.)

Mrs. Anderson did not take any part in the business at any time, and was not consulted with reference to its management, or with reference to withdrawals therefrom. On four occasions she signed

salary checks for the company when taxpayer was out of town. (R. 11.)

During the period September 14, 1940, to December 31, 1945, the F. E. Anderson Oil Company borrowed at least $354,125.82; $10,000 of that amount was borrowed by the company on the joint signature of taxpayer and his wife and the remainder was borrowed by the company on taxpayer's signature. During the same period taxpayer, on his own signature, borrowed at least $24,900. On October 15, 1945, taxpayer's wife borrowed $12,500 on a 90-day note on her own signature. (R. 11.)

The books of the F. E. Anderson Oil Company indicate that withdrawals were made by both taxpayer and his wife in 1940 through 1945. (For amounts see R. 11.) All withdrawals were initiated by the taxpayer without consultation with his wife. (R. 11.)

The income tax returns filed by taxpayer indicate that the earnings of the company increased considerably in 1940 and later years. (See R. 12.)

The living expenses of the taxpayer, his wife and family were about $12,000 to $16,000 per year, during the taxable years. Taxpayer gave his wife an allowance of not more than $200 for household expense. Above these amounts, they tried to divide the household expense equally. (R. 12.)

The Tax Court found that the taxpayer and his wife did not, during the taxable years, intend in good faith to carry on business as a partnership.

(R. 12.) Accordingly, it held that the taxpayer should include all of the income from the F. E. Anderson Oil Company in his gross income and decided that there are deficiencies in his income taxes for 1943, 1944 and 1945 in the amounts of $38,311.55, $46,736.62 and $27,600.44, respectively. (R. 7-8, 15.)

The Court of Appeals, in a *per curiam* order, affirmed the decisions of the Tax Court. (R. 335.)

ARGUMENT

The present cases are controlled by *Commissioner* v. *Culbertson,* 337 U.S. 733, *Commissioner* v. *Tower,* 327 U.S. 280, and *Lusthaus* v. *Commissioner,* 327 U.S. 293, which set forth the principles governing the taxation of the income of alleged family partnerships. These principles were accepted and applied to the particular facts of this case by the Tax Court, which found no genuine partnership. This determination was summarily sustained by the Court of Appeals, which thought the matter so clear as to make an opinion unnecessary. In these circumstances, it is respectfully submitted that there is no occasion for further review.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
ROBERT N. ANDERSON,
LOUISE FOSTER,
Special Assistants to the Attorney General.

MAY, 1951.

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CHARLES ELMORE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

H. MAURICE FRIDLUND,
ROBERT E. KLINE, JR.,
EARL Q. KULLMAN,
Counsel for Petitioner.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

PRELIMINARY STATEMENT.

Respondent's brief consists of a three sentence argument that the decision below is correct (Respondent's brief, p. 6). The respondent has failed to controvert the following:

That serious and irreconcilable conflict exists in the circuits and in the Tax Court (Pet., pp. 11-13);

That the decision of the Court below, in relying on *Morrison* v. *Commissioner,* 177 F. (2d) 351, flies in the face of the plain mandate of this Court's opinion in *Commissioner* v. *Culbertson,* 337 U. S. 733 (Pet., pp. 9-10; 23-24);

That respondent's arguments have convinced only the First and Second Circuits (Pet., pp. 11-12) and a rapidly diminishing minority of the Tax Court (Pet., pp. 17-22).

Petitioner's Argument in Reply.

I.

Without repeating the petitioner's arguments in the petition, two circumstances of respondent's campaign against family partnerships are noteworthy.

1.—*Respondent has never filed a petition for certiorari from any of the numerous reversals of Tax Court decisions which held partnerships invalid for tax purposes.* Yet, if the First and Second Circuits correctly interpret the law, the other nine circuits are incorrect.

2.—*Respondent has never taken an appeal to any of the circuits from any of the numerous Tax Court decisions which rejected the very arguments made below and here.**

* There are just two, and only two, cases where the Commissioner filed a petition for review. In both cases, the appeals were *nolle prossed. Commissioner* v. *Theurkauf* (2nd Cir.) No. 21,623, appeal dismissed on Commissioner's motion March 13, 1950 (appeal from 13 T. C. 529; taxpayer was represented by counsel now before this Court). *Commissioner* v. *Theodore F. Wilson* (3rd Cir.) No. 10,265, appeal dismissed on Commissioner's motion November 1, 1950 (appeal from 13 T. C. 409). The Commissioner has appealed from several District Court decisions adverse to his contentions, but failed to secure a single reversal. *Arnold, Coll.,* v. *Green,* 186 F. (2d) 18 (cited, Petition, p. 25), is typical of this line of cases.

Yet, if the diminishing minority of the Tax Court judges correctly interpret the law, the majority do not.

As Mr. Justice Jackson warned in a concurring opinion:

> "I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." *Railway Express Agency, Inc.* v. *New York* (1949), 336 U. S. 106, 112.

II.

Since the preparation of the petition for certiorari herein, later decisions show further emphatic rejection of respondent's arguments.

In *Visitainer* v. *Commissioner,* 10th Cir., 187 F. (2d) 519, March 10, 1951, the court again reversed the Tax Court (13 T. C. 805) and held a gift of sheep to minor children was valid and the father-donor not taxable on the income subsequently earned from sale of the sheep.

Two recent Tax Court cases are noteworthy. In *Jess J. Ellis,* T. C. Memo, Docket 26888, March 13, 1951, 10 T. C. M. 234, Judge Tietjins said:

> "We need not bother with the formalities of the arrangement between father and son. They were advised by their lawyer and following his advice did all those things necessary to satisfy the legal niceties in setting up a partnership. The question remains, whether the performance of the niceties was an empty ritual or an honest to goodness joining together as partners in the conduct of the enterprise."

The Court found the "necessary intent" and a valid partnership.

In a case on all fours in principle but not as favorable factually as the case now before this Court, Judge Raum (who, as Assistant Attorney General, argued the *Culbertson* case before this Court), in *Maurice Atlas,* T. C. Memo, Docket 24656, April 5, 1951, 10 T. C. M. 333, said (at p. 336):

> "We hold that petitioner and his wife executed a valid partnership agreement on June 1, 1944, and that they really and truly intended to join together, in accordance with the terms of the agreement, to conduct the business of Atlas Super Market as partners. Although the agreement was motivated by tax purposes, it reflected a genuine business relationship in which both parties actively contributed significant efforts to the enterprise. This was not the case of an artificial attempt to deflect the husband's income to his wife such as was present in *Commissioner* v. *Tower,* 327 U. S. 280, and *Lusthaus* v. *Commissioner,* 327 U. S. 293. True, Mrs. Atlas' capital contribution to the business was based upon a purported gift by her husband of a one-half interest therein. But petitioner's prior formal ownership of the business was in turn based upon family resources which were

attributable to the joint efforts of both spouses. We think that the facts in this case call for the recognition of the partnership agreement for tax purposes. *Cf. Commissioner* v. *Tower*, 327 U. S. at 290; *Commissioner* v. *Culbertson*, 337 U. S. 733."

Again, the Tax Court finds a valid partnership and rejects, more decisively, respondent's arguments (see Pet., p. 21).

III.

The respondent, while contending that the decision below is correct, has failed to discuss the arguments on which that decision was based. Those arguments are founded on the "income tax validity" concept. The pleas (express or implied) for judicial legislation follow the same erroneous pattern.

See:

United States v. *Pee Wee Coal Co.*, No. 168, this Term, April 30, 1951, ... U. S. ....., affirming 115 Ct. Cls. 626;

Woodward v. *United States*, No. 476, this Term, April 23, 1951, ... U. S. ....., reversing (8th Cir., 1950) 185 F. (2d) 134;

Riss & Co. v. *United States*, No. 479, this Term, April 16, 1951, ... U. S. ....., reversing Dist. Ct. (unreported).

This Court has only recently repeated the very fundamental proposition that "prompt, economical and sound administration of justice depends to a large degree upon definite and finally accepted principles governing important areas of litigation * * *."

See:

American Fire and Casualty Co. v. *Finn,* No. 252, this Term, April 9, 1951, ... U. S. .....

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

H. Maurice Fridlund,
Robert E. Kline, Jr.,
Earl Q. Kullman,
Counsel for Petitioner.